



COMMONWEALTH OF KENTUCKY  
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**20-ORD-128**

August 19, 2020

In re: Brennan Crain/Kentucky State Police

**Summary:** The Kentucky State Police (“KSP”) did not violate the Open Records Act (“the Act”) in denying a request to inspect records related to an ongoing and active police investigation.

***Open Records Decision***

On May 28, 2020, Brennan Crain (“Appellant”) submitted a request to KSP to inspect records relating to an “altercation” between an identified individual and a Glasgow Police Officer, which led to the individual’s death. Specifically, the records Appellant sought included the medical examiner’s report determining the cause of the civilian’s death, any video footage, including police body-camera footage, depicting the altercation, and the 911 CAD report dispatching the officers to the civilian’s home. In a timely response, KSP denied the request under KRS 61.878(1)(h) and KRS 17.150(2). KSP stated that the investigation of the incident was active and ongoing, and that premature release of the records would prejudice witnesses and affect their recollection of the events that occurred that evening.

KRS 61.878(1)(h) permits a law enforcement agency to deny a request for investigative records obtained by a law enforcement agency during a criminal investigation if premature disclosure of those records will cause harm to the investigation. In *City of Ft. Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842 (Ky. 2013), the Supreme Court of Kentucky held that investigative files of law enforcement agencies are not categorically exempt from disclosure under KRS 61.878(1)(h). Rather, when a record pertains to a prospective law enforcement action, KRS

61.878(1)(h) “is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when because of the record’s content, its release poses a concrete risk of harm to the agency in the prospective action.” *Id.* at 851. The Court in that case did not address the application of KRS 17.150(2), because the subject of the investigation had already been prosecuted and convicted. *See id.* at 846. Notwithstanding the agency’s claim that the convicted defendant could still seek post-conviction relief, the Court found that the agency had not satisfied its burden under KRS 61.878(1)(h). *Id.* at 852.

Thus, the holding in *Ft. Thomas* is inapplicable to KRS 17.150 because prosecution had already been completed at the time of the request. Under KRS 17.150, “[i]ntelligence and investigative reports maintained by criminal justice agencies are subject to public inspection *if* prosecution is completed or a determination not to prosecute has been made.” KRS 17.150(2) (emphasis added). Therefore, a condition precedent to the public’s right to inspect “intelligence and investigative reports” is the conclusion of the Commonwealth’s prosecution, or a decision not to prosecute. This Office has explained that a criminal justice agency may rely upon KRS 17.150(2) to temporarily deny inspection of “intelligence and investigative reports” without articulating a concrete risk of harm to the investigation. *See, e.g.,* 20-ORD-104 (holding that a police department is not required to articulate a concrete risk of harm when relying on KRS 17.150 and collecting prior decision that so held). Rather, under KRS 17.150(3), the criminal justice agency need only to identify the existence of potential law enforcement action with specificity. This Office has also held that autopsy reports, which are synonymous with medical examiner reports, may be temporarily withheld under KRS 17.150(2). *See, e.g.,* 20-ORD-105. Video footage, including police body-camera footage, may also be withheld temporarily. *See, e.g.,* 20-ORD-107. Likewise, this Office has considered CAD reports to be “intelligence and investigative reports.” *Id.*; *see also* 17-ORD-144; 11-ORD-171.

Here, KSP properly relied upon KRS 17.150(2) to temporarily deny Appellant’s request. The altercation occurred on April 14, 2020, not even two months prior to Appellant’s request. KSP specified that there is currently an active and ongoing investigation of the event. Accordingly, no decision to prosecute has been made at this time. All of the records Appellant has requested are “intelligence [or] investigative reports” under KRS 17.150(2). KSP further stated that premature release of these records could prejudice witnesses and affect their memories of the

events. Therefore, KSP did not violate the Act in denying Appellant's request until the completion of prosecution or a decision not to prosecute is made.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court per KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceeding.

Daniel Cameron  
Attorney General

/s/Marc Manley  
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Distributed to:

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